or even knowledge on his part of its execution, was unnecessary.[12] The contrary view, requiring an acceptance, involves much difficulty when the grantee is an infant or an insane person and in such cases the courts presume an acceptance, or in other words, adopt the common-law rule.[13]

The better rule is, "When the maker of a deed delivers it to some third party for the grantee, parting with possession of it, without any condition and without reserving any control, the delivery is complete and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor can defeat the effect of such delivery."[14] Later California cases agree that the question whether a deed has been delivered is not to be determined by mutual intent of grantor and grantee but solely by the intent of the grantor.[15]

T. G. C.

EASEMENTS: PROFITS À PRENDRE: NATURE OF RIGHT TO TAKE WATER FROM PIPES.—In the case of *Southern Pacific Company v. Spring Valley Water Company*[1] the railroad company granted to the water company by deed "the right to lay and maintain a line or lines of water pipe" in the grantor's land. The consideration stated was "the construction of a hydrant at" a certain station "and the free use of water therefrom for fire, station, and all other railroad purposes." Many years later, the water company having threatened to discontinue the supply of water, the question arose as to what was the nature of the railroad's right to the water in the pipe. Was it a profit à prendre, an easement, or a contract right? If the right was merely contractual, either party was en-

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[12] Degory v. Roe (1589), 1 Leon. 152, 74 Eng. Rep. R. 141; Butler and Baker's Case (1591), 3 Coke 25a, 76 Eng. Rep. R. 684; Thompson v. Leach (1690), 2 Vent. 198, 86 Eng. Rep. R. 391; Xenos v. Wickham (1863), L. R., 2 H. L. 296; Tiffany, Modern Law of Real Property, § 407.

[13] Parker v. Salmons (1897), 101 Ga. 160, 28 S. E. 681; Winterbottom v. Williams (1894), 152 Ill. 334, 38 N. E. 1050; Miller v. Meers (1895), 155 Ill. 284, 40 N. E. 577; Sneathen v. Sneathen (1891), 104 Mo. 201, 16 S. W. 497; Davis v. Garrett (1892), 91 Tenn. 147, 18 S. W. 113.

[14] Robbins v. Rascoe (1897), 120 N. C. 79, 26 S. E. 807.

[15] Kenniff v. Caulfield (1903), 140 Cal. 34, 73 Pac. 803; Estate of Cornelius (1907), 151 Cal. 550, 91 Pac. 329; Follmer v. Rohrer (1910), 158 Cal. 755, 112 Pac. 544. The statement is made in Bias v. Reed (1914), 169 Cal. 33, 145 Pac. 516, that "when the deed is executed and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect, the deed is validly delivered." No question as to meeting of minds should be raised in determining delivery, as shown in William v. Kidd, supra, n. 5, where the court points out, "the true test under which delivery is to be determined is in ascertaining whether, in parting with the possession of the conveyance, the grantor intended to divest himself of title. The solution of this question is grounded entirely on the intention of the grantor."

[1] (Aug. 22, 1916), 52 Cal. Dec. 273, 159 Pac. 865.

titled to terminate it after a reasonable time and upon a reasonable notice, for the agreement was silent as to its duration.[2] If, on the other hand, it was a property right, whether an easement or profit à prendre, it could not be so terminated.

An answer to the principal question is complicated by, and depends to a certain extent upon, the answers which may be given to two other questions: First, is water in pipes realty or personalty? And second, did the deed convey to the water company (*a*) title to land; i. e., a "corporeal" interest because involving the technical "possession" of land (but not necessarily an hereditament); or (*b*) mere rights in another's land, not involving "possession" thereof (and hence "incorporeal," but not necessarily hereditaments), in the nature either of a profit or an easement? The above two questions, when combined, involve four situations. These situations may be briefly stated and their necessary results indicated: (1) Suppose the water company acquired by the deed a section of land, and suppose, also, the water in the pipes to be realty; then there might be a profit à prendre to take the water. The taking would be (at common law) a profit and not an easement, as the water is not flowing in a natural stream.[3] (2) Suppose next that the water company acquired title to land, but that the water be regarded as personalty. The right of the railroad company would then be to use or take personal property confined in a space owned by the water company, which right could be neither a profit nor an easement.[4] (3) Suppose, next, the water company's right in the railroad's land to be an easement, and the water in the pipe to be personal property. Obviously, as in the second situation, neither a profit nor an easement could exist. (4) Finally, suppose the water company's right to be an easement, and the water in the pipes realty. The taking of the water-realty would be a profit; for only by treating the water in the pipes as a natural stream—denying the water to be property and recognizing merely rights of user therein—could one find an easement.[5] In cases similar to the fourth situation the question has frequently been discussed whether one right in re aliena can be "supported

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[2] Echols v. New Orleans (1876), 52 Miss. 610; McCullough etc. v. Philadelphia Co. (1909), 223 Pa. 336, 72 Atl. 633; Bellevue Borough v. Ohio V. W. Co. (1914), 245 Pa. 114, 91 Atl. 236.

[3] Race v. Ward (1855), 4 El. & Bl. 702, 119 Eng. Rep. R. 259; Jones, Easements (1898), § 55; Gale, Easements (8th ed.), pp. 8-10; Leake, The Law of Uses and Profits of Land (1888), p. 139; post, n. 5.

[4] Supra, n. 3, and post, n. 5.

[5] Manning v. Wasdale (1836), 5 Ad. & E. 758, 111 Eng. Rep. R. 1353; Hill v. Lord (1861), 48 Me. 83; 2 Blackstone (Christian's ed.) 18; supra, n. 3. Of course a profit à prendre in the grantor's land was not granted; nothing appears regarding the right to or disposition of the excavated dirt, to indicate such an intent and everything, on the contrary, shows that the grantee's rights were to begin *after* the removal of the soil in question.

by," or be "incident to," or "rest upon" another. The better view, however, seems to be that the right to use the water would not be a right "attaching to," or "incident to," or "resting upon" the easement to run the water-realty through another's land, but a right attaching to or directly affecting the water (property).[6]

The principal case seems clearly to fall into tne fourth situation above mentioned, in which the water company's right was considered an easement, and the water in the pipes realty.

As regards the nature of the right granted to the water company, it would, of course, have been entirely possible for the railroad company to have granted in fee either a strip of land or a tubular section of sub-soil.[7] But it is evident that land was not intended to be conveyed. The grant of title to land involves the grant of the exclusive *and* unrestricted use of the land granted;[8] but while the parties here obviously intended a grant of exclusive use to the space occupied by the pipes, it is equally clear that the use granted was not intended to be unrestricted. The water company, then, acquired a mere easement in the grantor's land, and so the court held.

The court also held the water in pipes to be realty. Water in natural streams or percolating through the soil, is not property, either real or personal. Where, however, such waters have been confined (by the exercise of legal rights) in reservoirs or other containers they become the subject matter of ownership. The general rule is that water thus reduced to ownership is personal property. This view is supported by Wiel, and by the majority of the cases.[9] Under the California decisions, however, water in ponds, reservoirs and pipes—in short, all water not wholly separated from the land—is realty.[10] The view taken in the principal case is therefore in accord with the California decisions.

Having determined that the water company acquired an easement in the land, and that the water in the pipes was realty, the

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[6] Beidler v. King (1904), 209 Ill. 302, 70 N. E. 763; Rugg v. Lemley (1906), 78 Ark. 65, 93 S. W. 570, 115 Am. St. Rep. 17; Berry v. Godfrey (1908), 198 Mass. 228, 84 N. E. 304; Co. Litt. 121b, n. 7; Hanbury v. Jenkins, L. R. (1901), 2 Ch. 401; Atty. Gen. v. Copeland, L. R. (1901), 2 K. B. 101, and L. R. (1902), 1 K. B. 690; 9 Columbia Law Review 74-76; Agreements to Pay for Party-Walls, 10 Michigan Law Review 187-211; The Party-Wall Easement, 9 Illinois Law Review 247-258.

[7] Laybourn v. Gridley (1892), 2 Ch. 53; Debenham v. Sawbridge (1901), 2 Ch. 98, 32 Law Quart. Rev. 70; Challis, Real Property (3d ed.), p. 54.

[8] Reilly v. Booth (1890), 44 Ch. Div. 12; Lee v. Stevenson (1858), El. Bl. & El. 512, 120 Eng. Rep. R. 600; supra, n. 7.

[9] Bear Lake Co. v. Ogden (1893), 8 Utah 494, 33 Pac. 135; Hagerman etc. Co. v. McMurray (N. M., 1911), 113 Pac. 823; Wiel, Water Rights in the Western States (3d ed.), Vol. 1, pp. 22-35; Jones, Easements, § 55; 1 California Law Review 484.

[10] Stanislaus Water Co. v. Bachman (1908), 152 Cal. 716, 93 Pac. 858; Leavitt v. Lassen Irrigation Co. (1909), 157 Cal. 82, 106 Pac. 404; Copeland v. Fairview Land etc. Co. (1913), 165 Cal. 148, 131 Pac. 119.

conclusion, under principles of the common law, would necessarily have been that the right to take the water was a profit—and validly created if the precedents be accepted which hold that such a right in re aliena would be one directly attaching to corporeal property, and not one "supported by" the easement right.[11] The court, however, held the right to be another easement. It is true that section 801 of the Civil Code seems to do away with the distinction between profits and easements, but that section has not been given the effect which its literal import would require. Whether, however, the right granted of taking the water was a profit, as at common law, or an easement under the code provision referred to, it would, as a property right granted for a consideration, be irrevocable so long as the grantor continued to use the right of way which was the consideration for the grant. And so the court held. But it is suggested that on principle and from the analogy of similar cases, the true intention of the parties, as gained from the language of the deed and from all the surrounding circumstances, was to make a contract for the sale of personal property (realty until severed) and not to grant a right in another's land.[12]

H. A. J.

GIFTS: RELEASE OF DEBTS.—For a creditor to make a gift of a debt to his debtor may be a commendable deed, yet honest attempts to do so are by no means certain of success. In *Sullivan v. Shea*[1] the evidence showed that the creditor had clearly, emphatically, and repeatedly declared his intention to forgive the debt, and had refused tenders of payment, yet it was held enforceable by his administratrix, upon the debtor's failure to give positive proof of delivery or destruction of the note; the inference that the decedent had destroyed it, arising from failure to find it among his effects, was not sufficient proof. The decision is undoubtedly sound on authority, though the result is contrary to the plain intention of the parties.

English law has been quite liberal to the debtor, more so than American, in this regard, particularly as to testamentary release of debt.[2] As to gifts inter vivos, including those causa mortis,[3] of which fraudulent claims are readily raised after the death of

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[11] See supra, notes 3, 5, 6.

[12] Tone v. Tillamook City (1911), 58 Ore. 382, 114 Pac. 938; McCullough etc. v. Philadelphia Co. (1909), 223 Pa. 336, 72 Atl. 633. In the present note we have ignored the public-utility aspects of the case.

[1] (Dec. 18, 1916), 23 Cal. App. Dec. 974, 162 Pac. 925.

[2] 24 Jurid. Rev. 201; 26 Harvard Law Review 445. Almost any expression of intention to forgive was formerly given validity.

[3] Gifts causa mortis are subject to the same requirements for validity as other gifts inter vivos. Beebe v. Coffin (1908), 153 Cal. 174, 94 Pac. 766; Darland v. Taylor (1879), 52 Iowa 503, 3 N. W. 510, 35 Am. Rep. 285.